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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

TYLER PICKETT LOWMAN,

Plaintiff and Respondent,

v.

CALIFORNIA BUREAU OF REAL  
ESTATE,

Defendant and Appellant.

D073519

(Super. Ct. No. 37-2017-00021444-  
CU-WM-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Richard E.L. Strauss, Judge. Reversed.

Xavier Becerra, Attorney General, Diane S. Shaw, Assistant Attorney General, Lisa W. Chao, Jane O'Donnell, and Charles Tsai, Deputy Attorneys General for Defendant and Appellant.

Klinedinst, Earl M. Pott, Harold C. Trimmer, and Catherine M. Asuncion for Plaintiff and Respondent.

Tyler Pickett Lowman, a licensed real estate broker, was convicted in federal court of conspiracy to commit wire fraud (18 U.S.C. § 371). The Commissioner of the

Department of Real Estate (Department)<sup>1</sup> found Lowman's conviction was cause for disciplinary action and revoked his real estate broker license. Lowman petitioned the trial court for a writ of administrative mandamus (Code Civ. Proc., § 1094.5). The trial court agreed that discipline was warranted under the circumstances but revised the penalty by directing the Commissioner to issue Lowman a restricted real estate salesperson license. The Department appeals, contending the trial court improperly substituted its discretion for that of the Commissioner as to the appropriate penalty. We agree. Because reasonable minds might differ as to the propriety of the penalty, we find no abuse of discretion in the Commissioner's decision to revoke Lowman's license. We therefore reverse the trial court's judgment and vacate the peremptory writ.

## BACKGROUND

### *A. Indictment and Conviction*

Lowman obtained his real estate broker's license in 2000. In 2011, he was indicted in the United States District Court for the Southern District of California on eight felony counts.<sup>2</sup> The indictment alleged Lowman acted with various co-conspirators to commit wire fraud. Specifically, the indictment alleged Lowman overstated his monthly income on four mortgage loan applications between December 2005 and April 2007 and added

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<sup>1</sup> Pursuant to Senate Bill No. 173 (2017-2018 Reg. Session), the Bureau of Real Estate (CalBRE) became the Department of Real Estate effective July 1, 2018. The Real Estate Commissioner (Commissioner) is the chief officer of the Department. (Bus. & Prof. Code, § 10050, subd. (a)(1).)

<sup>2</sup> Lowman was indicted on one count of conspiracy to commit wire fraud (18 U.S.C. § 371) and seven counts of wire fraud (18 U.S.C. § 1343).

other loan applicants to his bank accounts to obtain false verifications of deposits in support of their loan applications.

Lowman entered a guilty plea to one count of conspiracy to commit wire fraud. In November 2015, the district court sentenced him to four months in federal prison, two months in a residential reentry center, and an additional three years of supervision upon release from incarceration. The district court ordered Lowman to pay restitution of \$169,000. Lowman began his period of incarceration in or about December 2015.

*B. Accusation, Hearing, and Proposed Decision*

In June 2016, the Department filed an accusation against Lowman (and later an amended accusation), alleging that his conviction bore a substantial relationship to the qualifications, functions, or duties of a real estate licensee (Cal. Code Regs., tit. 10, § 2910), and thus constituted cause to suspend or revoke his license (Bus. & Prof. Code, §§ 490, 10177, subd. (b)).<sup>3</sup>

The accusation came on for hearing before an administrative law judge (ALJ) in November. After the hearing, the ALJ issued a proposed decision in which she made the following factual findings, which are not disputed:

Lowman was licensed as a real estate appraiser in 1994 by the Bureau of Real Estate Appraisers (BREA). He worked as an appraiser until 2000, when he obtained his real estate broker's license. Lowman acknowledged making false representations on four personal loan applications between 2005 and 2007. He was indicted in 2011 for this

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<sup>3</sup> We outline these governing statutes and regulations *post*. Further statutory references are to the Business and Professions Code, unless otherwise specified.

behavior along with various other co-conspirators, including his wife, from whom he is now separated. In 2015, upon entry of a guilty plea, he was convicted of one felony count of conspiracy to commit wire fraud.

Lowman has no disciplinary history, other than in connection with this conviction. In August 2015, the BREa disciplined Lowman in response to his conviction by revoking his real estate appraiser license, staying that revocation, and placing the license on probation, subject to a 30-day suspension and two years of probationary terms and conditions.

At the time of the hearing, Lowman had completed his term of imprisonment, was on probation, and was making monthly \$500 restitution payments. Lowman and his wife had attended family therapy, but after she told him she wanted a divorce, he began to attend personal therapy which helped him cope with the depression he felt, accept responsibility for his mistakes, and face the consequences of his behavior. At the time of the hearing, Lowman attended therapy less frequently than before because he had developed better coping skills and his depression had improved. He had embraced meditation and Buddhism which calmed him and helped him handle stress. He was actively involved with his children's extracurricular activities, including soccer and a father-daughter program. He no longer associated with people who have unethical business practices and had learned to distance himself from those not doing business "the right way." He hoped to continue working in the real estate industry with his broker's license.

Lowman's brother testified that Lowman was a positive influence on him throughout his life and that Lowman had expressed remorse for his criminal actions. Lowman's friend and colleague, another real estate broker, also testified in support and offered to oversee Lowman's broker work because he knew that Lowman was remorseful and committed to being honest in future business dealings. Lowman's mother testified that criminal behavior was out of character for him, that he was extremely remorseful, and that he was committed to moving forward and " 'turning over a new leaf.' "

In addition to witness testimony, Lowman submitted multiple letters attesting to his good character and level of remorse. A letter from his therapist attested that he had examined his responsibility for his poor choices, acknowledged accountability, and accepted lifestyle changes and challenges. A letter from his criminal attorney indicated that he was cooperative, respectful, and focused on his family for the duration of the criminal matter. Letters from his stepfather and a college friend remarked that Lowman had engaged in self-reflection since his conviction and had disassociated himself from his past business associates.

The ALJ concluded that Lowman's felony conviction for conspiracy to commit wire fraud constituted cause to impose discipline under sections 490 and 10177, subdivision (b). The ALJ described Lowman's criminal conduct as "very serious in nature" and provided the following evaluation of Lowman's case:

"[Lowman's] 2015 felony conviction for conspiracy to commit wire fraud was very serious in nature and involved fraudulent taking of funds belonging to another, as well as the use of false statements to achieve [that] end. Accordingly, [Lowman's] conviction is substantially related to the qualifications, functions, or duties of a

real estate licensee, particularly as his conviction evidences a lack of truthfulness, honesty and integrity required of a real estate broker. A real estate licensee must be truthful and honest and must have integrity at all times. 'Honesty and truthfulness are two qualities deemed by the Legislature to bear on one's fitness and qualification to be a real estate licensee.' (*Harrington v. Dept. of Real Estate* (1989) 214 Cal.App.3d 394, 402 [(*Harrington*)].) His conviction was only one year ago, however[,] the last acts that gave rise to the conviction happened about nine years ago. In that time period [Lowman] has engaged in extensive self-reflection and made significant changes in his life to ensure that he will never again engage in the behavior that resulted in his conviction. He has sought therapy, disassociated himself from his past business associates he had during his criminal behavior, fulfilled his parental duties and strengthened his family life, become involved in his community, had no other arrests or convictions, and demonstrated a significant change in his attitude from the time of his crimes. [Lowman] has demonstrated sufficient rehabilitation that he is a proper candidate for a real estate broker license with certain restrictions in place to ensure public protection."

Based on her finding that Lowman "presented substantial evidence of rehabilitation and mitigation," the ALJ concluded "it would not present a risk of harm to the public if he were granted a license with appropriate restrictions." The ALJ recommended restricting, rather than revoking or suspending, Lowman's license.

### *C. Commissioner's Decision After Rejection of Proposed Decision*

In January 2017, the Commissioner notified Lowman he would not adopt the ALJ's proposed decision and invited the parties to submit additional written arguments.<sup>4</sup> In May, the Commissioner issued a decision concluding that public safety was best protected by revoking Lowman's license.

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<sup>4</sup> Under Government Code section 11517, subdivision (c)(2)(E), the Department has the authority to "[r]eject the [ALJ's] proposed decision, and decide the case upon the record . . . with or without taking additional evidence."

The Commissioner acknowledged several factors in mitigation: Lowman did not deny his crime, he had sought therapy from a psychologist, and "he is a completely different person now." The Commissioner acknowledged that Lowman remains current on regular restitution payments and that numerous witnesses testified and submitted letters on his behalf.

The Commissioner also recognized several factors in aggravation: the conviction was very serious in that it occurred within the context of Lowman's licensed real estate activities; although Lowman had completed his period of incarceration and approximately six months of supervised release, his supervised release would continue for over two more years; although he remained up-to-date on restitution payments, he still owed approximately \$167,000; and, although he acknowledged making false statements to lenders in his personal loan applications, the indictment also alleged that Lowman offered to add other borrowers to his bank account to help them qualify for their loans.

Analyzing the regulatory criteria for rehabilitation, the Commissioner concluded that Lowman met "almost none" of the applicable factors:

"(a) (Passage of not less than two years from the most recent criminal conviction): It has not been at least two years since [Lowman's] conviction on November 16, 2015. Given the seriousness of [his] crime, a longer period of time will be required to assess [his] rehabilitation.

"(b) (Restitution): [Lowman] is still making restitution payments.

"(c) (Expungement): The conviction is not eligible for expungement.

"(d) (Penal Code section 290): Not applicable.

"(e) (Termination of probation): [Lowman's] supervised release will not be completed until approximately June 28, 2019.

"(f) (Abstinence from alcohol for not less than two years): Not applicable.

"(g) (Payment of fines): [Lowman] has not yet paid all fees and fines ordered by the court.

"(h) (Correction of business practices): Not applicable.

"(i) (New and different social and business relationships): [Lowman] testified that he is seeking individual therapy, and that he no longer has contact with the business associates he had at the time of his crimes.

"(j) (Stability of family life): [Lowman's] own family appeared stable before his crimes, and they continue to support [him.] [Lowman's] wife was also prosecuted in the same criminal case, and [Lowman] testified that the resulting marital problems led to their separation.

"(k) (Education or training for economic self-improvement): [Lowman] offered no evidence of education or training.

"(l) (Involvement in community): [Lowman] testified that he has been active in activities involving his children's soccer teams and interests.

"(m) (Change in attitude): At the administrative hearing, [Lowman] testified that he got caught up in a 'culture' and lifestyle that led to his criminal activity. He stated that he has learned his lesson."

The Commissioner concluded, based on these circumstances, it was too soon to know whether Lowman is rehabilitated:

"[Lowman] has only begun his supervised release following imprisonment for a serious crime. It is too soon to know whether [Lowman] is rehabilitated. Rehabilitation as a matter of law does not exist. It is merely a component of the penalty which is vested in the discretion of the Agency 'subject only to *manifest abuse*.' [(*Windham v. Board of Medical Quality Assurance* (1980) 104 Cal.App.3d 461, 472 [(*Windham*).)] Considering all these factors, rehabilitation has not been shown."

The Commissioner expressly disagreed with the ALJ's conclusion that it would be consistent with the public interest to allow Lowman to have a restricted real estate broker license. The Commissioner explained that, if Lowman was granted a restricted license as recommended by the ALJ, there would be no broker oversight to monitor his activities and protect the public, because "[a] restricted license allows licensees to perform the same acts as a non-restricted licensee including the same access into homes of members of the public." "Our most effective means of protecting the public is to revoke a license when there is any doubt about the [r]espondent's rehabilitation."

*D. Petition for Writ of Mandate*

Lowman petitioned the superior court for relief, contending the weight of the evidence established he was rehabilitated, so the penalty imposed was too severe. Lowman particularly contested the Commissioner's determination that the recency of his conviction weighed against a finding of rehabilitation, since the bad acts—and his

willingness to take responsibility for them—occurred much earlier.<sup>5</sup> Lowman urged the superior court to reweigh the evidence and exercise its independent judgment to find he was fully rehabilitated and to compel the Commissioner to allow him to maintain his broker license or to issue a restricted salesperson license.

The Department opposed Lowman's petition, contending that revocation of Lowman's license was warranted under applicable law, Lowman had not established all of the rehabilitation criteria, and the Commissioner's decision regarding the penalty to impose should not be disturbed absent a manifest abuse of discretion.

The trial court granted Lowman's petition, concluding the decision to revoke Lowman's license was not supported by the record, and the record supports a finding of rehabilitation.

The trial court offered the following analysis:

"In determining whether a licensee has been rehabilitated, the court considers the factors set forth in [Cal. Code Regs., tit. 10, § 2912]. Here, the decision, issued on May 2, 2017, is partially premised on

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<sup>5</sup> In a declaration submitted to the trial court, Lowman averred he entered his guilty plea in February 2015 and requested the trial court to take judicial notice of documents attesting to that fact. Although the trial court granted Lowman's request for judicial notice, the court indicated it did not consider these documents because they were outside the administrative record. (See *Cassidy v. Cal. Bd. of Accountancy* (2013) 220 Cal.App.4th 620, 626-627 (*Cassidy*) [in administrative mandate proceeding, trial court proceeds on the administrative record].) Lowman agrees that the trial court correctly did not consider documents outside the administrative record and acknowledges there is no evidence in the administrative record of the date he initially entered his guilty plea, only the date he was sentenced. Nonetheless, Lowman's testimony at the administrative hearing indicated that he cooperated with the government after his indictment, which may have delayed entry of his guilty plea and sentencing. His criminal attorney's letter in support (offered as evidence in the administrative proceeding) corroborated the fact that Lowman cooperated with the government.

[Lowman's] underlying conviction occurring on November 16, 2015. [Citation.] This reliance is hyper-technical in this case. [Lowman] committed the offenses from 2005-2007. [Citation.] [Lowman] was indicted in 2011. [Citation.] [Lowman] pled guilty prior to his sentencing, which occurred in November 2015. Given passage of approximately ten years between the criminal conduct and the present and that there is no evidence [Lowman] has committed any further offenses since 2007, [the BRE's] reliance on this factor against a finding of rehabilitation is not supported by the evidence. Based upon the record, there is no evidence that [Lowman's] decade[-]old criminal conduct compels an outright revocation of [Lowman's] license in order to protect the public.

"The remaining applicable factors also merit in favor of a finding of rehabilitation. [Lowman] continues to make monthly restitution payments and has been involved in the parenting of his two young children. [Citation.] In addition, [Lowman] is in compliance with regard to his other professional licenses. [Citation.] [Lowman] has reformed his business practices to prevent a reoccurrence of the situation which led to criminal conduct and is no longer in contact with those associated involved [sic] in the criminal activities. [Citation.] There is substantial evidence of rehabilitation from [Lowman] as well as work associates, friends and family."

Based on these conclusions, the trial court issued a peremptory writ of mandate modifying the penalty imposed by directing the Department to issue a restricted salesperson license.

## DISCUSSION

The Department contends the trial court improperly substituted its judgment for that of the Commissioner regarding the appropriate penalty to impose. The Department acknowledges that the facts underlying the Commissioner's decision to impose disciplinary action are subject to the trial court's independent judgment, but argues the Commissioner's determination regarding the appropriate penalty is subject to reversal only upon a showing of the Commissioner's manifest abuse of discretion. Lowman

contends the trial court correctly exercised its independent judgment in finding rehabilitation and argues the only question for this court is whether substantial evidence supports the trial court's finding of rehabilitation. We agree with the Department that the sole issue before this court is whether the trial court erred in vacating the penalty imposed by the Commissioner and directing that a different, less restrictive penalty be imposed. The Commissioner's determination regarding the appropriate penalty is subject to reversal only upon a showing of manifest abuse of discretion, and the trial court erred in substituting its discretion for that of the Commissioner concerning the degree of punishment imposed.

*A. Nature of the Disciplinary Proceedings*

"The [C]ommissioner may suspend or revoke the license of a real estate licensee" who has "[e]ntered a plea of guilty or no contest to, or been found guilty of, or been convicted of, a felony, or a crime substantially related to the qualifications, functions, or duties of a real estate licensee . . . ." (Bus. & Prof. Code, § 10177, subd. (b)(1); see *id.*, § 490, subd. (a) ["In addition to any other action that a board is permitted to take against a licensee, a board may suspend or revoke a license on the ground that the licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued."].) A crime is substantially related to the qualification, functions, or duties of a real estate licensee if it involves a fraudulent taking or obtaining of funds; uttering a false statement; or employing fraud, deceit, falsehood, or misrepresentation to achieve an end. (Cal. Code Regs., tit. 10, § 2910, subd. (a)(1)-(2), (4).)

Business and Professions Code section 482 requires each department to which its provisions apply to "develop criteria to evaluate the rehabilitation of a person when[] [] . . . [] [c]onsidering suspension or revocation of a license under Section 490." (Bus. & Prof. Code, § 482, subd. (a)(2).) The Department's criteria for evaluating the rehabilitation of a licensee who has committed a crime include the following: the time that has elapsed since commission of the acts or offenses; restitution; expungement of the conviction; successful completion or early discharge from probation or parole; payment of any fine imposed in connection with the criminal conviction; correction of business practices responsible in some degree for the crimes; new and different social and business relationships from those which existed at the time of the commission of the acts that led to the criminal conviction; stability of family life and fulfillment of parental and familial responsibilities subsequent to the criminal conviction; completion of formal education or vocational training courses; significant and conscientious involvement in community, church, or privately-sponsored programs designed to provide social benefits; and change in attitude from that which existed at the time of the commission of the criminal acts. (Cal. Code Regs., tit. 10, § 2912.)

As an alternative to disciplining a licensee by suspending or revoking his license, the Department has the discretion to issue a restricted license. Section 10156.5, subdivision (a) provides: "The [C]ommissioner may issue a restricted license to a person: [] (a) Who . . . has been licensed under this chapter and who has been found by the [C]ommissioner after a hearing to have violated provisions of Division 4 of this code where such violation would justify the suspension or revocation of the license."

The highest priority for the Department in exercising its disciplinary functions is the protection of the public. (§ 10050.1.) "Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount." (*Ibid.*; see *Small v. Smith* (1971) 16 Cal.App.3d 450, 457 ["[t]he object of an administrative proceeding aimed at revoking a license is to protect the public, that is, to determine whether a licensee has exercised his privilege in derogation of the public interest, and to keep the regulated business clean and wholesome"].)

#### B. *Standard of Review*

Because a "real estate broker's license is a 'vested' right[,]. . . the administrative decision is reviewed by means of a limited trial de novo in which the trial court not only examines the record for errors of law but also exercises its independent judgment upon the *weight* of the evidence produced before the administrative agency, together with any further evidence properly admitted by the court." (*Milner v. Fox* (1980) 102 Cal.App.3d 567, 571, fn. 5.) As such, the "trial court reviewing the administrative decision of the Commissioner to revoke the license of a real estate broker or salesperson must exercise its independent judgment on the evidence underlying that decision and determine whether the Commissioner's findings are supported by the weight of the evidence." (*Cal. Real Estate Loans, Inc. v. Wallace* (1993) 18 Cal.App.4th 1575, 1580 (*Wallace*); Code Civ. Proc., § 1094.5.) Although the trial court exercises its independent judgment in determining whether there is a factual basis to support disciplinary action, its authority is not unconstrained. "In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party

challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817.)

When the trial court exercises its independent judgment, the "reviewing court then must determine whether the trial court's factual findings concerning the truth of the accusations or alleged violations are supported by substantial evidence." (*Wallace, supra*, 18 Cal.App.4th at p. 1580.) As to those matters where the trial court properly exercised its independent judgment, "we resolve all conflicts and indulge all reasonable inferences in favor of the prevailing party." (*Deegan v. City of Mountain View* (1999) 72 Cal.App.4th 37, 45 (*Deegan*).)

"A different rule applies when the issue is the nature of the penalty imposed. A court will not disturb the decision of the Commissioner on the penalty unless the licensee demonstrates an abuse of discretion. Neither a trial court nor an appellate court is free to substitute its discretion for that of an administrative agency concerning the degree of punishment imposed." (*Wallace, supra*, 18 Cal.App.4th at p. 1580; see *Barber v. State Personnel Bd.* (1976) 18 Cal.3d 395, 404 [same]; *Harrington, supra*, 214 Cal.App.3d at p. 405 ["the penalty imposed by an administrative agency will not be disturbed unless there has been a clear abuse of discretion"]; *Cadilla v. Bd. of Medical Examiners* (1972) 26 Cal.App.3d 961, 966 (*Cadilla*) ["the propriety of a penalty imposed by an administrative agency is a matter vested in the discretion of the agency and its decision may not be disturbed unless there has been a manifest abuse of discretion"].)

A manifest abuse of discretion is not established where reasonable minds may differ as to the appropriate level of discipline (*Deegan, supra*, 72 Cal.App.4th at pp. 46-47), even if the trial court or the appellate court believes the penalty imposed was too harsh. (*Szmaczarz v. State Personnel Bd.* (1978) 79 Cal.App.3d 904, 921.)

Importantly for purposes of this appeal, different standards of review apply to agency determinations regarding (1) the existence of *misconduct* sufficient to justify disciplinary action and (2) the severity of the *penalty* imposed for that misconduct—a trial court exercises its independent judgment as to the first issue but not the second.<sup>6</sup> (See, e.g., *Windham, supra*, 104 Cal.App.3d. at p. 473 ["While . . . the trial court must exercise its own independent judgment in determining whether the findings which would justify discipline in the first place are supported by the weight of the evidence, the propriety of the penalty to be imposed—in the light of rehabilitation and other relevant factors—is vested in the discretion of the [Commissioner], subject only to 'manifest abuse.' "]; *Dresser v. Bd. of Medical Quality Assurance* (1982) 130 Cal.App.3d 506, 510 (*Dresser*) ["[i]n cases involving the Board's decision to revoke a professional license, the independent judgment standard is the standard to be used by the superior court except as to the determination of the penalty imposed"].) "With respect to the question of penalty, the superior court's powers of review are quite limited, and are exercised only with great

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<sup>6</sup> We disagree with Lowman's assertion that our only role is to consider whether the trial court's finding of rehabilitation is supported by substantial evidence. There is no dispute that some disciplinary action is warranted—the only question is the type of penalty to impose. "This court reviews de novo the administrative agency's determination of penalty, giving no deference to the trial court's decision on the issue." (*Cate v. State Personnel Bd.* (2012) 204 Cal.App.4th 270, 284.)

deference to the administrative agency's findings." (*Deegan, supra*, 72 Cal.App.4th at p. 45.)

" 'In reviewing the severity of the discipline imposed, we look to the correctness of the agency's decision rather than that of the trial court.' [Citation.] ' "The penalty imposed by an administrative body will not be disturbed in mandamus proceedings unless an abuse of discretion is demonstrated. [Citations.] *Neither an appellate court nor a trial court is free to substitute its discretion for that of the administrative agency concerning the degree of punishment imposed.* [Citation.]" [Citation.] [¶] "In reviewing the exercise of this discretion we bear in mind the principle 'courts should let administrative boards and officers work out their problems with as little judicial interference as possible . . . . Such boards are vested with a high discretion and its abuse must appear very clearly before the courts will interfere.' " ' [Citation.] 'The policy consideration underlying such allocation of authority is the expertise of the administrative agency in determining penalty questions.' " (*Cassidy, supra*, 220 Cal.App.4th at p. 633.)

*C. The Commissioner Did Not Abuse His Discretion in Revoking Lowman's License*

The parties do not dispute—and the trial court agreed—that Lowman's conviction constitutes cause to suspend or revoke his real estate broker's license. (Bus. & Prof. Code, §§ 490, 10177, subd. (b); Cal. Code Regs., tit. 10, § 2910, subds. (a), (b).) As such, we review the Commissioner's decision regarding the severity of the discipline imposed (*Cassidy, supra*, 220 Cal.App.4th at p. 633) and conclude Lowman did not establish the Commissioner abused his discretion.

The Commissioner determined that, because Lowman was convicted (i.e., sentenced) in November 2015, the conviction was sufficiently recent to weigh against a finding of rehabilitation. (Cal. Code Regs., tit. 10, § 2912, subd. (a).) Lowman criticizes the Commissioner's reliance on the fact that less than two years had elapsed since the conviction because the illegal conduct occurred between 2005 and 2007, and Lowman was indicted in 2011 and pled guilty to the offenses before he was convicted (i.e., sentenced) in November 2015.

Under the governing regulation, "for the purpose of evaluating whether or not a licensee . . . is rehabilitated," the Department will consider:

"(a) The time that has elapsed since commission of the act(s) or offense(s):

"(1) The passage of less than two years after the most recent criminal conviction or act of the licensee that is a cause of action in the Bureau's Accusation against the licensee is inadequate to demonstrate rehabilitation.

"(2) Notwithstanding subdivision (a)(1), above, the two[-]year period may be increased based upon consideration of the following:

"(A) The nature and severity of the crime(s) and/or act(s) committed by the licensee.

"(B) The licensee's history of criminal convictions and/or license discipline that are 'substantially related' to the qualifications, functions, or duties of a real estate licensee." (Cal. Code Regs., tit. 10, § 2912, subd. (a).)

There is no dispute that more than two years had elapsed since Lowman's most recent *criminal act* in 2007. Recognizing the regulation also allows the Department to consider the passage of time from the *conviction*, Lowman argues his conviction should

be construed to have occurred in early 2015, when he claims he initially entered his guilty plea. (See *Boyll v. State Personnel Bd.* (1983) 146 Cal.App.3d 1070, 1073-1074 [" 'conviction' " sometimes is defined "in a narrow sense signifying a verdict or guilty plea," but other times is "given a broader scope so as to include both the jury verdict (or guilty plea) *and* the judgment pronounced thereon"].) Under this construction, more than two years had elapsed since Lowman's conviction (i.e., guilty plea) when the Commissioner issued his decision in May 2017, taking Lowman outside the two-year scope of section 2912, subdivision (a)(1) of Code of Regulations, title 10.

Even if we accept Lowman's construction, it does not undermine the Commissioner's determination or establish " 'an arbitrary, capricious or patently abusive exercise of discretion.' " (*Cadilla, supra*, 26 Cal.App.3d at p. 966.) The regulation dictates that the passage of less than two years from the most recent criminal conviction or act is inadequate to demonstrate rehabilitation. Even if exceeding a two-year period were adequate to demonstrate rehabilitation, that same two-year period "may be increased based upon consideration of . . . [¶] [t]he nature and severity of the crime(s) and/or act(s) committed by the licensee." (Cal. Code Regs., tit. 10, § 2912, subd. (a)(2)(A).) The Commissioner found that Lowman's crime here was "very serious" because it "occurred within the context of [Lowman's] licensed real estate activities." The Commissioner concluded more time was necessary to assess rehabilitation, as evident from his statement, "It is too soon to know whether [Lowman] is rehabilitated." The ALJ also found that the felony conviction for conspiracy to commit wire fraud was "very serious in nature." Given the plain language of the governing regulation and the

Commissioner's findings, the Commissioner was acting within his discretion in concluding the passage of time did not compel a finding of rehabilitation.

The Commissioner identified two additional regulatory factors weighing against the finding of rehabilitation: Lowman's supervised release would continue for more than two years (Cal. Code Regs., tit. 10, § 2912, subd. (e) [citing "[s]uccessful completion or early discharge from probation or parole" as a factor in favor of finding rehabilitation]) and Lowman still owed a substantial amount (approximately \$167,000) in restitution (*id.*, subd. (b) [payment of restitution as factor regarding rehabilitation]; *id.*, subd. (g) [payment of fines imposed with the criminal conviction as factor regarding rehabilitation].)<sup>7</sup>

The Commissioner was further concerned that Lowman did not fully accept responsibility for his actions. Although Lowman acknowledged at the administrative hearing making false statements in his personal loan applications, he did not acknowledge the indictment's allegations that he assisted other borrowers' fraud by adding them to his bank account to help them qualify for their loans. The Commissioner appropriately considered Lowman's failure to accept full responsibility in determining the appropriate penalty to impose. (See *Hanna v. Dental Bd. of Cal.* (2012) 212 Cal.App.4th

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<sup>7</sup> Lowman acknowledges these factors may weigh against rehabilitation, but, consistent with his argument that the trial court's decision should only be reviewed for substantial supporting evidence, contends that favorable inferences from these facts—e.g., that Lowman has thus far complied with the terms of his supervised release and his restitution payment schedule—should be construed in support of reversing the Commissioner's penalty determination.

759, 767 [no abuse of discretion where board revoked license based in part on finding that licensee was unwilling to admit wrongful acts].)

Under the governing statutes and regulations, license revocation is among the acceptable administrative penalties resulting from Lowman's criminal conviction. (Bus. & Prof. Code, §§ 490, 10177, subd. (b)(1); Cal. Code Regs., tit. 10, §§ 2910, 2912.) The Commissioner had the authority to issue a restricted license as an alternative, lesser form of punishment (Bus. & Prof. Code, § 10156.5, subd. (a)), but was not required to do so. The Commissioner considered and weighed all applicable rehabilitation factors before determining it was appropriate to revoke Lowman's license. Although we recognize the severity of revoking Lowman's license under the circumstances here, as the trial court did, applying the appropriate standard of review, we find no manifest abuse of discretion in the Commissioner's decision to impose the penalty of license revocation.

*D. The Trial Court Erroneously Substituted Its Discretion for That of the Commissioner Concerning the Degree of Punishment Imposed*

The trial court agreed with the Commissioner that some level of discipline was appropriate but disagreed with the Commissioner regarding Lowman's level of rehabilitation and the severity of the discipline imposed. Specifically, the trial court disagreed with the Commissioner's conclusion that the evidence "compels an outright

revocation of [Lowman's] license," and instead directed the Commissioner "to issue a restricted sales person license."<sup>8</sup>

The trial court's order granting administrative mandamus here suffers from the same infirmity as the one identified in *Cadilla, supra*, 26 Cal.App.3d 961. In that case, like here, the trial court agreed with the determination of underlying misconduct but disagreed with the nature of the penalty imposed. Specifically, "the court reviewed the record of the administrative proceedings and, presumably in the exercise of its independent judgment, found that the [Commissioner's] finding that respondent was guilty of unprofessional conduct in having suffered a conviction of a crime involving moral turpitude and its findings pertaining to the circumstances surrounding the commission of the crime were supported by the weight of the evidence. The court nevertheless determined that 'it was an abuse of discretion' to revoke respondent's license. In so doing, the court erroneously substituted its own judgment and discretion for that of

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<sup>8</sup> In reaching its decision, the trial court discussed some of the rehabilitation criteria considered by the Commissioner—specifically disagreeing with the Commissioner's treatment of the passage of time—but failed to address other factors weighed by the Commissioner. The trial court failed to address the fact that Lowman's supervised release would continue for more than two years (Cal. Code Regs., tit. 10, § 2912, subd. (e)) and he still owed approximately \$167,000 in restitution (Bus. & Prof. Code, § 2912, subd. (b) & (g)). The trial court also did not address the Commissioner's concern that Lowman did not fully accept responsibility for his actions. Rather than recognizing these findings that support the Commissioner's disciplinary action, the trial court emphasized that Lowman has not committed "any further offenses." Given that Lowman remains on probation, this fact is not determinative. (See *Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 939 ["[i]t is not enough that petitioner kept out of trouble while being watched on probation; he must affirmatively demonstrate over a prolonged period his sincere regret and rehabilitation"].) Finally, the trial court did not address the Commissioner's and ALJ's findings regarding the "very serious" nature of Lowman's crimes.

the [Commissioner] with respect to the penalty to be imposed." (*Id.* at pp. 967-968.)

Similarly here, by directing that Lowman's license be restricted, rather than revoked, the trial court improperly substituted its judgment for that of the Commissioner as to the appropriate penalty.

The decision in *Windham, supra*, 104 Cal.App.3d 461 is also instructive. In that case, the medical board initiated disciplinary proceedings to revoke a doctor's professional license on the basis that the doctor's prior, out-of-state conviction for tax fraud was substantially related to the qualifications, functions, or duties of the profession. The board concluded that discipline was warranted and revoked the doctor's license, but stayed revocation and placed the doctor on probation. (*Id.* at pp. 467-468.) Applying its independent judgment, the trial court granted the doctor's petition for writ of mandate, finding—as relevant here—that the doctor had become "totally rehabilitated" since his conviction. (*Id.* at p. 468.)<sup>9</sup> The Court of Appeal reversed and expressly rejected the trial court's conclusion that imposing discipline was improper in light of the trial court's independent determination (contrary to the board's conclusion) that the doctor was totally rehabilitated:

"This argument rests on several erroneous assumptions, both legal and factual. While, as noted, the trial court must exercise its own independent judgment in determining whether the findings which would justify discipline in the first place are supported by the weight of the evidence, the *propriety of the penalty to be imposed—in the*

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<sup>9</sup> The trial court also concluded that the tax fraud conviction did not warrant discipline. The Court of Appeal disagreed and held, as a matter of law, the felony of tax fraud was substantially related to the qualifications of the practice of medicine. (*Windham, supra*, 104 Cal.App.3d at pp. 472-473.)

*light of rehabilitation and other relevant factors—is vested in the discretion of the Board, subject only to 'manifest abuse.'* [Citation.] The trial court evidently failed to draw that distinction or, perhaps, it erroneously felt that a finding of complete rehabilitation was compelled. Indisputably, that was not the case. The fact that a professional who has been found guilty of two serious felonies rigorously complies with the conditions of his probation does not necessarily prove anything but good sense. Nor did the court have to accept respondent's own protestations of rehabilitation. The trial court therefore exceeded its powers when it found that '[the doctor] had become totally rehabilitated since his conviction . . . .'" (*Windham, supra*, 104 Cal.App.3d at p. 473, italics added.)

Like the trial court in *Windham*, the trial court here exceeded its powers when it substituted its discretion for that of the Commissioner regarding the propriety of the disciplinary penalty. (See *Kazensky v. City of Merced* (1998) 65 Cal.App.4th 44, 73-75 [reversing trial court's decision granting writ of mandate which overturned penalty of termination imposed by administrative body]; *Deegan, supra*, 72 Cal.App.4th at p. 46 ["Having concluded that [terminated worker] in fact committed all the offenses alleged against him, the superior court was then required to uphold [agency's] punishment if there was any reasonable basis for sustaining it."].)

There are instances where an agency's chosen sanction reflects a manifest abuse of discretion, but those cases are rare. (*Doe v. Regents of University of Cal.* (2016) 5 Cal.App.5th 1055, 1106 ["[i]t is only in the exceptional case, when it is shown that reasonable minds cannot differ on the propriety of the penalty, that an abuse of discretion is shown'"].) One example is *Magit v. Board of Medical Examiners* (1961) 57 Cal.2d 74, which Lowman urges this court to follow. In *Magit*, the Board of Medical Examiners revoked a doctor's license to practice medicine after he permitted three highly trained—

but unlicensed—anesthesiologists to administer anesthetics under his supervision. (*Id.* at p. 79.) The Supreme Court held that in so acting, the doctor violated the law and was guilty of unprofessional conduct. (*Id.* at p. 87.) However, the court concluded the board's imposition of the maximum penalty (license revocation) was excessive because the law on permitting unlicensed doctors to administer anesthetics was uncertain and the doctor acted in "utmost good faith" and immediately halted the use of the unlicensed anesthesiologists when the board indicated that it was not proper. (*Id.* at p. 88.)

Lowman's reliance on *Magit* is misplaced. Lowman did not act in "utmost good faith" when he committed his crimes and there was no ambiguity in the laws he violated.

Unlike *Magit*, this is not "the exceptional case" in which "reasonable minds cannot differ on the propriety of the penalty." (*Doe v. Regents of University of Cal.*, at p. 1106.)

In sum, while we are sympathetic to Lowman's argument, we do not find the Commissioner manifestly abused his discretion in revoking Lowman's license. "Even were the penalty to appear harsh to us, still we would not be free to substitute our discretion for that of the administrative body. The fact that reasonable minds might differ as to the propriety of the penalty imposed fortifies the conclusion that the administrative body acted within its discretion . . . ." (*Dresser, supra*, 130 Cal.App.3d at p. 519; accord *Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 106-107.) Because the trial court improperly substituted its judgment for that of the Commissioner regarding the degree of penalty imposed, and directed the Commissioner to impose a less severe penalty, we reverse.

## DISPOSITION

The judgment of the trial court is reversed, and the peremptory writ of mandate is vacated. Appellant is entitled to its costs on appeal.

GUERRERO, J.

WE CONCUR:

HUFFMAN, Acting P. J.

AARON, J.